No. 95

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 95

TALBOT JENNINGS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE RESPONDENT.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE RESPONDENT.

The briefs in Jennings v. Illinois, No. 95, and La Frana v. Illinois, No. 96, are identical.

THE JENNINGS CASE, NO. 95, AND THE LA FRANA CASE, NO. 96, DIFFER ONLY IN THE DETAILS OF RESPECTIVE PETITIONERS' NARRATIVES OF ALLEGED FACTS WHICH ARE CLAIMED TO HAVE RESULTED IN THEIR CONVICTIONS AND IMPRISONMENT WITHOUT DUE PROCESS OF LAW.

IN EACH CASE, THE PETITIONER CLAIMS TO HAVE BEEN CONVICTED UPON AN EXTORTED CONFESSION AND UPON OFFICIALLY SUBORNED PERJURY. (IN THE LA FRANA CASE,

No. 96, THE ALLEGED OFFICIALLY SUBORNED PERJURY CONSISTS ONLY IN THE SUPPOSED FALSE TESTIMONY THAT PETITIONER'S CONFESSION WAS VOLUNTARY. IN THE JENNINGS CASE, No. 95, IT ALLEGEDLY CONSISTS ALSO IN FALSE STATEMENTS AS TO THE FACTS CONCERNING PETITIONER'S ARREST AND A SEARCH OF HIS HOME.)

THE ONLY QUESTION PRESENTED IS WHETHER PETITIONER'S RESPECTIVE CLAIMS ARE COGNIZABLE IN THIS STATE STATUTORY PROCEEDING, THERE BEING NO SUBSTANTIAL SUGGESTION IN EITHER CASE THAT PETITIONER WAS PREVENTED FROM ASSERTING HIS CLAIMS IN THE PROCEEDING CULMINATING IN HIS CONVICTION.

THEREFOR IDENTICAL BRIEFS ARE FILED IN BOTH CASES, THE WORD "PETITIONER" REFERRING IN EACH CASE, RESPECTIVELY, TO THE PETITIONER IN THAT CASE.

RESPONDENT'S ACCEPTANCE OF PETITIONER'S STATEMENT OF THE CASE.

Petitioner's counsel has stated the case fully, fairly and accurately. We accept his Statement of the Case without correction or addition.

Opinion Below.

As petitioner's brief correctly states, the Illinois Supreme Court rendered no opinion other than the memorandum and rescript fully and correctly set forth in petitioner's brief. It is not reported.

The Question Presented.

The question presented is:

> DOES THE ILLINOIS SUPREME COURT'S OPINION REST UPON THE ADEQUATE GROUND OF STATE LAW THAT THE ILLINOIS POST CONVICTION REMEDIES ACT DOES NOT AFFORD A MEANS OF ASSERTING MATTERS OF FACT OR CLAIMS OF CONSTITUTIONAL RIGHT THAT WERE OR MIGHT HAVE BEEN PRESENTED IN THE PROCEEDINGS CULMINATING IN PETITIONER'S CONVICTION, IT NOT APPEARING THAT HE WAS PREVENTED FROM ASSERTING SUCH ALLEGED FACTS OR CLAIMS IN THAT ANTECEDENT PROCEEDING?

Properly analyzed, this case presents no question of *res judicata* as opposed to due process of law. The question is whether petitioner's claims, once adjudicated in proceedings intrinsically affording due process, can be asserted *in this purely statutory proceeding*, the purview and ambit of which are delimited by the act creating it as that act has been authoritatively construed by the Illinois Supreme Court.

The Illinois Supreme Court has answered this question in the negative.

The question of permissible latitude of review in Federal post conviction proceedings, such as *habeas corpus* or statutory motion for review, is, we submit, not presented.

SUMMARY OF ARGUMENT.

I.

The Illinois Supreme Court's judgment rests solely upon the ground that Illinois' Post Conviction Remedies Act does not afford an appropriate mode of asserting constitutional claims that were or might have been presented in the proceedings culminating in petitioner's conviction, there being no substantial suggestion that those claims were not and could not have been presented in those proceedings. This is a ground of State procedure, not of Federal constitutional law. Therefore this writ of *certiorari* should be dismissed.

II.

The scope of permissible inquiry upon Federal *habeas corpus* is not an obligatory measure of the scope of inquiry afforded by a purely statutory State proceeding.

III.

Even if the Federal scope of inquiry as to collateral attack on judgments of conviction were the measure of inquiry under this State statutory proceeding, petitioner would not be entitled to a retrial of issues which he litigated or could have litigated at the time of his original conviction.

IV.

If the merits of the case were before the Illinois Supreme Court, then its judgment must still be affirmed because it must be deemed to have weighed petitioner's affidavit as against the evidence and findings in the trial court record and therefore permissibly concluded that petitioner had not "demonstrated" a denial of due process of law.

ARGUMENT.

I.

The Illinois Supreme Court's judgment rests solely upon the ground that Illinois' Post Conviction Remedies Act does not afford an appropriate mode of asserting constitutional claims that were or might have been presented in the proceedings culminating in petitioner's conviction, there being no substantial suggestion that these claims were not and could not have been presented in those proceedings. This is a ground of State procedure, not of Federal constitutional law. Therefore this writ of certiorari should be dismissed.

Petitioner's counsel concedes, with highly commendable fairness and candor, that petitioner's allegations of fact and claims of constitutional rights, *if those alleged facts are cognizable and those claims are justiciable in this proceeding,* make so clear a case of denial of due process that the Illinois Supreme Court's judgment can not rationally be supposed to rest upon a holding that petitioner is justly and duly imprisoned under the Federal constitution even though the averments of alleged fact be taken as true. Therefore, as petitioner's counsel likewise concedes, the Illinois Supreme Court's judgment must have been posited upon the tacit but clear premise that petitioner may not assert these claims in this statutory proceeding.

To phrase this consideration and concession in another way: The Illinois Supreme Court certainly did not hold that a man may be arrested without warrant or probable cause, detained many days *incommunicado,* forced by brutality to confess and suffer conviction on his confession

thus extorted, bolstered by evidence which State prosecuting officials knew to be perjured, all without denial of due process of law under either the Federal or State constitutions. Therefore the Illinois Supreme Court's judgment necessarily rests upon that court's view that petitioner may not assert these claims *in this State statutory proceeding.*

The only authoritative exposition of the Illinois Post Conviction Remedies Act (Ill. Rev. Stats. 1951, Ch. 38, pars. 826-832, pp. 1446-1447) is to be found in *People* v. *Dale*, 406 Ill. 238, which held that Act constitutional but strictly limited its purview to inquiry into constitutional claims that petitioner did not present and could not have presented in the proceeding resulting in his conviction.

The following excerpts from the Illinois Supreme Court's unanimous opinion in *People* v. *Dale* are pertinent (p. 244):

> "The State's Attorney contends that the act does violence to article III of the Illinois constitution because it provides for rehearings and retrials on constitutional issues in causes finally adjudicated; invests power in a *nisi prius* court to set aside its own final judgments regardless of their antiquity, and the final judgments of the Supreme Court. **We do not read such disturbing features into the act and it is not subject to the criticism directed against it in that regard.** It merely provides a procedure by which the judiciary may determine whether or not constitutional rights have been impinged. Should this court, upon a proper record before it, pass upon any given constitutional question in a case, it is not likely the lower court would attempt to overrule or alter the decision. No such power in the lower court is afforded by the act."
>
> **"The remedy provided for under the act cannot be employed to obtain another hearing upon claims of denial of constitutional rights as to which a full and final hearing on the merits has already been had.** * * *" (Emphasis supplied.).

Finally, in *People* v. *Dale*, the Illinois Supreme Court makes it clear that the scope of this statutory remedy is,

as is the scope of remedy afforded by Illinois' statutory substitute for the common law writ of *coram nobis*, confined to matters which petitioner *not only did not but could not present at the time of his original trial or plea of guilty.*

In the *Dale* case the court said, at page 245:

> "* * * **The act in question does not provide for the means of refuting or disputing the original findings and judgment or the affirmance thereof,** but it provides for a new proceeding to afford an inquiry into the constitutional integrity of the proceeding in which the judgment was entered. * * *" (Emphasis supplied.)

As thus authoritatively construed by the Illinois Supreme Court, the office of the statutory Post Convictions Remedies Proceeding and the purview of inquiry which it permits become clear: **The Post Conviction Remedies Act inaugurates a purely statutory remedy, which petitioner need not invoke unless he so chooses, and which, when invoked, affords no mode of inquiring into matters of fact or law which were or might have been litigated in the original proceedings culminating in conviction.**

Were petitioner to assert that he was illegally detained, forced to confess, convicted upon perjured testimony, forced to plead guilty, or otherwise denied due process *and were petitioner to couple these assertions with further substantial charge that he was prevented from vindicating or litigating his claims by, for example, want or incompetency of counsel, he being unable effectively to express his claims without counsel, or, for further example, by concealment of the alleged perjury, the Illinois Supreme Court presumably would in petitioner's case, as it has in past cases, take cognizance of these assertions.*

That the Illinois Supreme Court is not deaf to such claims is clear from the following cases: *People v. Carter*, 403 Ill. 567, recognizes *coram nobis* as an appropriate mode

of asserting that petitioner was convicted without due process *and was prevented from obtaining due process by lack of counsel on arraignment,* although the court found the allegations not sustained by the proof.

People v. *Green,* 355 Ill. 468, holds that where convicted defendants are deprived of constitutional right because of want of competent counsel, *coram nobis* is available.

The Illinois Supreme Court's announcement in *People* v. *Loftus,* 400 Ill. 432, rendered pursuant and in obedience to this court's opinion, judgment and mandate in that case (*Loftus* v. *Illinois,* 334 U. S. 804), declares that where a prisoner was convicted by a jury several of whose members had sat on a previous jury convicting him of a similar and cognate offense *and was prevented from claiming his obvious rights by the court's refusal to appoint counsel for him, habeas corpus* would be available. Incidentally, Loftus subsequently brought *habeas corpus* and was discharged.

But the Illinois Supreme Court has held in the *Dale* case, *supra,* that the Illinois legislature did not, by enacting the Illinois Post Conviction Remedies Act, authorize collateral inquiry into a judgment as to matters which, for aught that petitioner alleges to the contrary, he either asserted or might have asserted in the proceedings in which he was originally convicted.

The ambit of jurisdiction and purview of permissible inquiry in a State proceeding are matters of State law even though claims of substantive Federal rights are asserted. *White* v. *Ragen,* 324 U. S. 760.

II.

The scope of permissible inquiry upon Federal habeas corpus is not an obligatory measure of the scope of inquiry afforded by a purely statutory State proceeding.

Petitioner's counsel argues in substance that Illinois' legislature cannot create a Post Conviction Remedy at all unless it creates a remedy equal in latitude with that afforded by Federal *habeas corpus*.

But this Court has held that the *Federal* writ of *habeas corpus* has been enlarged by Act of Congress so as to afford a scope of inquiry unknown to the common law definition that was the basis for the Federal constitutional provisions embodied in the Bill of Rights. (*Franks* v. *Mangum*, 237 U. S. 309.) Therefore, whatever may be the substantive requisites of due process, there is no Federal right to vindicate petitioners' instant claims in a proceeding of which the purview is limited by the State act authorizing it.

We therefore do not in this case reach the question: Is due process afforded when petitioner has been accorded an opportunity to urge in a prior proceeding that due process was afforded, or must the classical concepts of *res judicata* yield to any substantial assertion that in prior proceedings, a claim of denial of due process, though that claim was or might have been fully presented, was wrongly rejected? No such question is presented in this case.

It is evident that all that the Illinois Supreme Court has held is that where an imprisoned Illinois convict raised, or was not prevented from raising, a substantial Federal constitutional question in the proceeding culminating in his conviction, he may not raise that question under the Illinois Post Conviction Remedies Act. Whether he could or could not raise it in a Federal *habeas corpus* proceeding is not before this court in this case.

Petitioner's counsel rightly insists upon a "realistic" appraisal of this case. Such an appraisal must contemplate the following considerations:

Courts sitting in Illinois, both State and Federal, are inundated by a floodtide of petitions in which prisoners seek to relitigate issues of fact, such as questions as to the voluntary or involuntary character of their convictions, as to the veracity of prosecuting witnesses and as to official knowledge of alleged perjury. These petitions nearly always seek retrial of issues decided many years ago. Witnesses have died, memories (except those of the prisoners) have become dim, records of ancient trials are generally not available, and when they are available, do not reproduce the personalities of witnesses, judge and counsel.

Of course the fact that a prisoner may be a desperate criminal does not afford the slightest ground for denying him due process of law. But the Illinois Supreme Court has not held that it does. What that court has held is that the Legislature did not intend to authorize *under this act* retrial of these cases *absent a showing that the prisoner was prevented from fairly asserting his claims in the proceeding that resulted in his conviction, sentence and imprisonment.* This holding goes to the scope of the remedy, not to any ultimate substantive question of Federal constitutional law.

Petitioner points to the practical inadequacy of appellate review in Illinois in those cases, except cases where the death penalty has been imposed, in which a prisoner can not afford a transcript of record. But the Illinois Post Conviction Remedies Act does not cure such inadequacy. In general, stenographic transcripts of testimony, evidence and the judge's charge to the jury are no more available in this proceeding than they would be on a writ of

error. A prisoner's claim of denial of due process at his trial must usually rest upon a reconstruction of the alleged tenor of those proceedings from the subjective recollections of those present at the time of the trial.

In some cases, such as the instant case, it so happens that a stenographic transcript is available. When that is true, it is of course admissible, as it was admitted in the instant case, to show what happened at the trial. This does not mean, however, that if it appears that the trial court erred in applying constitutional precepts to petitioner's case, or that the jury wrongly assayed conflicting evidence, that error can be corrected *in this statutory proceeding.*

The simple truth is that the Illinois legislature has not intended this proceeding as a substitute for writ of error or other conventional mode of appellate review. The Illinois Supreme Court has so held in the *Dale* case. That holding, since it deals with the scope of a State statutory remedy, is conclusive here.

The Illinois Supreme Court's judgment rests solely upon the ground that the instant proceeding, which is wholly statutory, does not afford any means of vindicating petitioner's rights in this case, there being no showing that he was deprived of an opportunity to assert those rights in the proceedings ultimating in his conviction.

Properly understood, this case raises no question of *res judicata* as a substantive doctrine or concept in criminal cases where Federal constitutional claims are asserted. It involves only the scope of inquiry permissible *in this State statutory proceeding.* The scope of inquiry, so long as it is limited by the remedy involved, is a matter of State law.

Of course a State could not, as a plaintiff, force an accused or convicted person into a proceeding, foreclose by

procedural limitations the assertion of Federal constitutional claims, and then make the result *res judicata*. But this proceeding is statutory and permissive. The prisoner who invokes it does so voluntarily and is subject to the limitations inherent in its statutory nature.

III.

Even if the Federal scope of inquiry as to collateral attack on judgments of conviction were the measure of inquiry under this State statutory proceeding, petitioner would not be entitled to a retrial of issues which he litigated or could have litigated at the time of his original conviction.

We have demonstrated that the Illinois legislature was not bound to create a statutory remedy of latitude measured by that of Federal statutory *habeas corpus* or the Federal statutory motion for a new trial or other Federal mode of attack upon a judgment of conviction.

But even if we assume, for the sake of argument only and without conceding, that the State legislature was bound to adopt the purview of Federal statutory proceedings as measuring the scope of State statutory proceedings, that assumption does not aid the petitioner.

Sunal v. *Large*, 332 U. S. 174, is by no means directly in point. But it declaring that the scope of Federal *habeas corpus* today is a statutory enlargement of the common law writ and that it may not in general be invoked as a substitute for appeal. We cite the case as authority for the proposition that even in statutory proceedings brought in Federal courts to attack Federal convictions, where there is no question of the partition of sovereignty between the State and the National government, due process is not denied by foreclosing review *in such statutory* proceedings substan-

tial of admittedly very claims of injustice occurring at the time of the prisoner's conviction.

We particularly commend to the Court the decision of the United States Court of Appeals for the Fourth Circuit in *Smith* v. *United States*, 187 F. (2) 192. The opinion in that case, while of course it is not authoritative here, carefully studies the question of the right of a convicted person to assail collaterally, *via habeas corpus* or statutory delayed motion for a new trial, his conviction on the ground that it resulted from an allegedly coerced confession, perjuriously pronounced voluntary by the testimony of public officials. That court reaches the conclusion that where, as in the instant case, nothing, such as, e. g., mob domination, absence of counsel or suppression or concealment of official subornation of perjury, prevents a fair trial upon the issues of fact, neither Federal *habeas corpus* nor the Federal motion for a new trial is available to the prisoner.

In the instant case, all of petitioner's contentions tender only issues of fact which were controverted at the time of petitioner's trial. In neither case does it appear that petitioner was deprived of a fair trial, by an impartial judge and an unbiased jury, upon those questions of fact.

We therefore submit, *first*, that the scope of the Federal rule does not necessarily measure the scope of the Illinois State statutory proceeding involved in this case and, *second*, that if the Federal rule did measure the scope of the Illinois State statutory proceeding, the Federal rule is correctly conceived by the *Smith* case and would prevent petitioner's instant attempt collaterally to assail his conviction.

IV.

If the merits of the case were before the Illinois Supreme Court, then its judgment must still be affirmed because it must be deemed to have weighed petitioner's affidavits as against the evidence and findings in the record and thereupon permissibly concluded that petitioner had not "demonstrated" a denial of due process of law.

We do not retreat from our insistence that, as conceded by counsel for petitioner, the Illinois Supreme Court's judgment should be read as resting upon the ground, clearly articulated in the *Dale* case, that this State statutory proceeding does not afford petitioner a means of collaterally attacking his conviction upon claims that were or might have been litigated in the proceedings that resulted in his conviction.

But if we assume that the Illinois Supreme Court deemed the merits of petitioner's claims before it in this proceeding, its judgment should be affirmed.

Hysler v. *Florida*, 315 U. S. 411, is directly apposite: In that case, Hysler had been sentenced to death for murder. Four years after his conviction, he brought *coram nobis*, appending affidavits to the effect that he had been convicted upon false and perjured testimony. The Supreme Court of Florida weighed these affidavits against the trial court record, refusing Hysler any oral hearing *de novo* in which he should have the opportunity of summoning witnesses.

This Court held that this disposition of the case accorded due process. This Court said that a State court may require something more than affidavits uncontradicted in the Post Conviction proceeding before granting a rehearing if the record in the original trial substantially contradicts

those affidavits and leaves the State court satisfied that substantial justice has been done.

> "* * * The Court had to judge the substantiality of this claim on the basis of all that was before it, namely, the petition with its accompanying affidavits and the records of prior cases arising out of the same crime. The Court concluded that Hysler's proof did not make out a *prima facie* case for asking the trial court to reconsider its judgment of conviction. However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. * * *"

Lisenba v. *California*, 314 U. S. 219, is also in point. The *Lisenba* case was here on two consolidated writs of *certiorari*, one to review the Supreme Court of California's affirmance of petitioner's conviction on direct appeal under the laws of that State and one to review denial of petitioner's application for *habeas corpus*. That application, like the instant applications under Illinois Post Conviction Remedies Act, asserted by affidavits *dehors* the original record of conviction that petitioner had been convicted upon an extorted confession and perjury.

No trial was granted, nor was oral evidence received, on the *habeas corpus* proceeding.

This Court affirmed both the original conviction and the refusal to entertain collateral attack upon it *via habeas corpus*, approving the California's court's appraisal of the affidavits and their contradiction by the record of conviction.

If the Illinois Supreme Court, tacitly overruling its limitation of the scope of the act by the *Dale* case, can be deemed to have entertained this petition on its merits, then it also must be presumed to have weighed the petition as against the trial court record and found it insufficient to entitle the petitioner to what would in effect be a new trial.

Section 6 of the Illinois Post Conviction Remedies Act (Ill. Rev. Stats. 1951, Ch. 38, par. 832, p. 1147) is as follows:

> "The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge may be necessary and proper."

It must therefore be presumed that if this proceeding was appropriate under State law, then both the trial court and the Supreme Court of Illinois assayed petitioner's affidavits in counterpoise against the evidence taken at the time of his trial and permissibly concluded that petitioner had not, as a matter of fact, demonstrated any trial of due process in the proceedings culminating in his conviction.

Conclusion.

For the reasons suggested in this brief, we respectfully submit that the writ of *certiorari* should be dismissed because no Federal question is presented.

Respectfully submitted,

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